UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/760
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 760

Case No. 822: ZOUARI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;

Whereas, at the request of Ahmed Zouari, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 31 August and 30 November 1993, 31 January, 29 April, 31 July and 31 October 1994;

Whereas, on 27 October 1994, the Applicant filed an application requesting the Tribunal, inter alia:

"8. ...

(a) To find that his assignment to ECA [Economic Commission for Africa] was governed by the Vacancy Management System;

(b) To find that failure by ECA Administration to take action for the implementation by OHRM [Office of Human Resources Management] of his promotion to the P-5 level as from 1 January 1990 has deprived the Applicant from acquired rights under ST/AI/338/Add.2, paragraphs 3 and 4, Add.4, paragraph 3 and Add.6, paragraph 7;

...

(d) To rule that the comments and ratings by the Chief, Administration and Conference Services Division, on the Applicant's performance evaluation reports on 11 October 1991

should be deleted from the Applicant's first and third performance evaluation reports at ECA, that the second performance evaluation report should be expunged from the Applicant's file, that the period covered by the third performance evaluation report should begin on 1 December 1989, and that both the first and the third performance evaluation reports should be completed by the Executive Secretary of ECA on the basis of the ratings provided by the respective first reporting officer;

...

(f) To rule that the promotion of the Applicant must be effected under ST/AI/338/Add.2 para. 3, Add.4 para. 3, and Add.6 para. 7, based on the Applicant's performance evaluation reports as revised in accordance with the judgement of the Tribunal in the present case.

...

(h) To direct the Respondent, meanwhile, to pay to the Applicant the education grant for three school years of his daughter (September 1989 - June 1992), the DSA [daily subsistence allowance] denied to him and his daughter by the Chief, Administration and Conference Services Division following their evacuation from Addis Ababa to Nairobi while he was on assignment to ECA and the DSA for the two missions undertaken by the Applicant to service ECA conferences in Arusha, Tanzania (February 1990) and in Tripoli, Libya (April 1990);

(i) To direct the Respondent to pay to the Applicant travel expenses and DSA for his journey to and stay in New York in 1991 ...

(j) To award the Applicant compensation equivalent to a one year salary for the repeated and systematic violations of his rights as well as for the damage caused by the Respondent to the Applicant's reputation, both professionally and personally; and

..."

Whereas, the Respondent filed his answer on 17 March 1995;

Whereas, the Applicant filed written observations on 1 May 1995;

Whereas, on 25 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1978, on a probationary appointment, at the P-2 level, as an Associate Arabic Translator in the Department of Conference Services at Headquarters. On 1 May 1980, he was granted a permanent appointment and promoted to the P-3 level. On 1 April 1983, the Applicant was promoted to Reviser at the P-4 level.

With effect from 30 April 1982, the Applicant was assigned to the United Nations Environment Programme (UNEP) in Nairobi, for a term of two years, which was extended twice, for two-year periods, through 28 April 1988. He returned to Headquarters as Translator in the Arabic Service, Translation Division, Department of Conference Services. On 1 July 1989, he was assigned to the Economic Commission for Africa (ECA) for a period of one year and granted a special post allowance (SPA) to the P-5 level. His functional title was Acting Chief, Translation Services, ECA.

A vacancy announcement for the post of Chief, Translation Services, ECA, was circulated in 1988. The Applicant applied for the post. None of the candidates was found to be acceptable by ECA. The post No. UNH-13710-E-P5-041LG - Vacancy Announcement No. 88-T-ECA-318-AA/Recirc. Chief, Translation Services - was re-advertised in May 1989, and the Applicant again applied. He was informed in a letter dated 24 May 1989, from the Recruitment and Placement Officer, Professional Staffing Service, that he would be "considered with regard to the eligibility criteria and the requirements of the post along with the qualifications of other candidates". He would "be informed of the outcome as soon as this information is available". Following a meeting between the Executive Secretary of ECA and the Applicant, on 16 June 1989, a Recruitment and Placement Officer informed the Applicant that "the

Executive Secretary of ECA has agreed to your assignment from Headquarters - for one year as Chief, Translation Services". A Personnel Action was issued stating "Assignment to ECA, ... for one year and entitlement to SPA to P-5, ..." It listed the Applicant's functional title as "Acting Chief, Translation Services".

Prior to his retirement, the Chief of Conference Services Section, ECA, who was the Applicant's supervisor, prepared a performance evaluation report (PER) for the Applicant, covering the period from 1 July 1989 to 30 November 1989. For the non-language items in the PER, the Applicant was given 5 "A"s and 7 "B"s, and his supervisor commented that the Applicant "maintains very good working relations with everybody" and that "the [Applicant] is very efficient in supervising and motivating ... staff". The Applicant's second reporting officer, the Chief, Administration and Conference Services Division (ACSD), did not, at the time, sign the report.

On 29 June 1990, the Chief, ACSD, cabled Headquarters requesting that the Applicant's assignment be extended "until such time as we will be able to better assess his performance". An extension of 12 months was authorized with effect from 16 July 1990. In a memorandum dated 17 August 1990, the Chief, ACSD, informed the Applicant that he "had very specific instructions from the Executive Secretary to prepare your PER covering the first year of your assignment to ECA". In the memorandum, he also criticized the Applicant's performance.

On 13 September 1990, the Applicant filed a complaint with the ECA Panel on Discrimination and Other Grievances (the Panel on Discrimination). On 11 January 1991, he was informed that his within-grade salary increment was being withheld, with effect from 1 July 1990, on the basis of a memorandum dated 9 January 1991 from the Chief, ACSD. The Applicant filed a rebuttal against this decision.

In a cable dated 28 January 1991, to the Director, Translation Division, Division of Conference Services (DCS), the

Chief, ACSD, proposed that the Applicant be transferred back to Headquarters on 28 February 1991. He stated that the Applicant "has shown himself since assignment here as being totally incapable of appreciating the most elementary aspects of his jcb as a supervisor and coordinator". On 29 January 1991, the Chief, Personnel Section, ECA, informed the Applicant that he would be returning to Headquarters as of 28 February 1991.

In a reply dated 1 February 1991, the Director, Translation Division, DCS, informed the Chief, ACSD, ECA, that the Applicant's assignment should continue until the Executive Secretary made a final decision on the Applicant's rebuttal and until the Panel on Discrimination had completed its investigation of the Applicant's complaint. On 4 February 1991, the Chief, ACSD, ECA, repeated his earlier request.

On 4 February 1991, the Co-ordinator of the Panel on Discrimination sent its report to the Executive Secretary. The report stated, inter alia:

> "Conclusion
>
> 16. The panel concludes that it finds the grievance tabled legitimate. Action is needed to enable the staff member to work according to his job description without hardship.
>
> Recommendation
>
> 17. The staff member should not be penalized for administrative oversight. The instruction by the Executive Secretary to prepare a comprehensive PER does not in any way imply by-passing normal procedures of UN Rules and Regulations.
>
> The panel views the PER submitted on [the Applicant] by the [Chief, Conference Services] on his retirement as valid. It needs to be completed by the second reporting officer."

On 10 April 1991, the Chief, ACSD, signed the PER but expressed the belief that it was not valid. On 22 April 1991, he completed Part IV of the PER, commenting that the period it covered

"was too short for an objective appraisal to be made of the staff member's performance and conduct ... Consequently I disagree with the first reporting officer".

ECA had prepared PERs for the Applicant's second year of service, for the periods from 1 December 1989 to 30 June 1990, and from 1 July 1990 to 28 February 1991. On 17 April 1991, the Applicant complained that the Chief, ACSD, appeared on the PERs as both the first and second reporting officer.

On 29 July 1991, the Chief, Personnel Section, ECA, informed a Personnel Officer, Office for Human Resources Management (OHRM), Headquarters, that the Chief, ACSD, had not accepted the PER prepared by the retired Chief, Conference Services, because he and the Applicant were at the same grade level and "one staff member at a given level cannot act as the first reporting officer of another staff member of the same level in the same section ..."

On 2 August 1991, the Applicant requested the Secretary-General to review the refusal of the Chief, ACSD, to accept the Applicant's immediate supervisor as the first reporting officer, the negative evaluation of his performance outside of the PER system and the use of these evaluations to bar him from a promotion to which he was entitled under the Vacancy Management System (VMS).

In a cable dated 29 August 1991, the Assistant-Secretary-General for OHRM informed the Chief, ACSD, that the Applicant's assignment was not through the VMS. He directed that his assignment be extended through October 1991, and that, by that time, his PER and related procedures should be completed. He indicated that the primary responsibility for completion of a PER lies with the staff member's immediate supervisor as the first reporting officer, whether or not the supervisor is at the same level as the staff member being evaluated.

Three PERs were completed and transmitted to the Applicant for the periods from 1 July to 30 November 1989, from 1 December 1989 to 1 March 1990, and from 1 April 1990 to 31 October 1991. The

second PER, signed by the Chief, ACSD, as both first and second reporting officer, gave the Applicant an overall rating of "Fair". In the third PER, the Chief of Conference Services Section acted as first reporting officer and made the following comments with regard to the two "C" ratings relating to supervision: "The rating largely reflects the lack of co-operation [the Applicant] experienced from some staff members in the Division in the exercise of his functions ... His efforts in that direction deserve a higher rating since they have been thwarted by the uncooperative response of certain staff members ..."

The Applicant rebutted all three PERs. An ad hoc Investigating Panel was established on 4 November 1991. On 29 November 1991, the Applicant requested the Secretary-General to review the decision of 30 October 1991, to redeploy him back to Headquarters before the panel had completed its consideration of his rebuttals. On 13 March 1992, the ad hoc Investigating Panel transmitted its report to the Acting Executive Secretary, which concluded and recommended as follows:

> "Rules and other established procedures governing PER's have not been duly observed by the second reporting officer and the extensive delay in completing the three PER's casts some doubts on the accuracy of the reports (see section II of this report for details).
>
> The plaignant's (sic) assignment to ECA took place under unusual conflictual circumstances which developed throughout the period and which did not make it possible for [the Applicant] to exercise his supervisory role as appropriate. As discussed earlier [the Applicant] shared responsibilities in this situation with the ECA Adminstration and staff members of the unit at large.
>
> As the main thrust of the PER's should precisely focus on the plaignant's (sic) proven ability to effectively supervise the ECA translation section, members of the panel are of the view that the above situation did not warrant a fair and objective assessment of [the Applicant's] performance throughout his assignment with ECA. We therefore recommend that the three PER's be suspended and that whenever feasible the staff

member be given another probationary opportunity under different circumstances."

On 23 March 1992, the Acting Executive Secretary initialled the document with the note "seen" but did not take any further action on it. On 4 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 14 January 1993. It contained the following considerations, findings and recommendation:

"29. The Panel reviewed Appellant's contention that he had been assigned to ECA under the Vacancy Management System (VMS) and that he should have been considered for promotion under the VMS provisions. The Panel agreed that the Administration had failed to define clearly the conditions under which Appellant was assigned, and concurs with the author of the note dated 12 August 1991 ... that Appellant had reason to be - at the least - confused.

30. The Panel remarked, however, that even if Appellant's assignment was under VMS - and, in its view, that had not been proven - then it was difficult to establish that he had suffered from the arrangement. It is true that he may have been deprived of the consideration for promotion to which he would have been entitled under VMS, but (a) there is no entitlement to promotion, and (b) a promotion would only have been possible with positive PERs, but given the nature of the PERs which would have been before the APB at the time of consideration, a favourable outcome was unlikely.

31. The Panel then turned to consider the PERs themselves. It noted that the provisions of ST/AI/240/Rev.2 had not been followed in their preparation, or, for that matter, in the withholding of Appellant's within-grade increment. It felt that there were irregularities in the preparation of the PERS which may well have affected fair consideration of his performance but that there was insufficient evidence that he had been so deprived. Appellant had not, in the Panel's view, produced evidence of any extraneous factors.

32. As to the decision, and the timing thereof, to return him from ECA to Headquarters, the Panel found that the Secretary-General acted within his authority under Staff Regulation 1.2."

Findings and recommendation

33. In arriving at its conclusion, the Panel took note of the reports and conclusions of the other panels which considered earlier aspects of this appeal in ECA. Having decided that Appellant had suffered injury as a result of the uncertainties of the nature of his assignment to ECA and of the irregularities in the preparation of his PERs while there, the Panel concluded that it could make no recommendation that would alleviate the injury.

34. The Panel recommends, therefore, that Appellant be paid the sum of two thousand dollars ($2,000.00) as recompense for the injury suffered."

On 28 January 1993, the Director of Personnel transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had accepted the JAB's recommendation and "decided, accordingly, that you be paid $2,000 in recompense for injuries from irregularities in the preparation of your periodic evaluation reports."

On 27 October 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The Applicant's assignment to ECA was under the VMS. He was entitled to a promotion in accordance therewith.

2. The Applicant's PERs were flawed by procedural irregularities, as was the decision to withhold his salary increment without a special report, as required.

3. The JAB's consideration of the Applicant's claims was vitiated by procedural flaws. The JAB did not have complete documentation relevant to the claims.

4. The Applicant has been the victim of repeated and systematic abuse of power and prejudicial treatment because of his former role as an outspoken Chairman of the United Nations Environment Programme Staff Union.

Whereas, the Respondent's principal contentions are:

1. The Applicant's claims for education grant, DSA following evacuation from Addis Ababa, travel expenses and DSA in 1991, are not properly before the Tribunal as they were not submitted to the JAB.

2. The Applicant has been adequately compensated for the injury suffered as a result of the uncertain nature of his assignment to ECA and for the irregularities in the preparation of his PER.

3. The Applicant does not produce evidence of prejudice against him.

The Tribunal, having deliberated from 10 to 26 July 1996, now pronounces the following judgement:

I. The procedure in this case commences with the institution, by the Applicant, of a recourse against the administrative decision of 31 October 1991, to end his services at ECA and to order him to return to Headquarters. In his first submission dated 29 November 1991, he claims that he had been assigned to ECA following his "application for the post of Chief, Translation Services, in the framework of the VMS [Vacancy Management System]". He also adds that he worked at ECA for more than two years before being informed that his selection to fill the post had not been carried out in accordance with the VMS in force at the time, pursuant to ST/AI/338 and its addenda.

On 4 May 1992, the Applicant lodged an appeal before the JAB. In his submission, he states that his appeal is directed against "the way my career has been administered in connection with my assignment to ECA as Chief of Translation Services since July 1989". The main grievances listed by the Applicant relate to the manner in which his performance was evaluated.

The JAB considered both issues, i.e., that connected with the applicability of the VMS to the Applicant's transfer to ECA and that related to the manner in which he had been evaluated. In its report, the JAB recognized that the Applicant "had suffered injury as a result of the uncertainties of the nature of his assignment to ECA and of the irregularities in the preparation of his PERs ..." It consequently recommended the granting of compensation in the amount of US$2,000.

II. As to the Applicant's contention that his transfer had taken place under the VMS, the JAB only gave its opinion by way of a remark, saying that "even if Appellant's assignment was under VMS - and, in its view, that has not been proven, then it was difficult to establish that he had suffered from the arrangement".

The JAB's report was subsequently considered by the Secretary-General, who decided to accept the JAB's recommendation and granted US$2,000 as compensation. It is to be noted, however, that the decision taken by the Secretary-General to grant compensation is based solely on the injuries suffered in connection with the preparation of the Applicant's performance evaluation reports (PERs). It does not refer to the uncertainties of the Applicant's assignment to ECA that were mentioned in the JAB's report.

Upon receipt of the Secretary-General's decision, the Applicant appealed to the Tribunal.

III. In his submission to the Tribunal, the Applicant, in addition to his previous claims, requests promotion, payment of the education grant, reimbursement of travel expenses and changes in his PERs.

Bearing in mind the foregoing sequence of events, the Tribunal finds that the issues properly before it are only those connected with the applicability of the VMS and with the handling of his PERs.

The Applicant's claims connected with his promotion and his entitlement to education grants or to reimbursement of certain expenses were not submitted to the JAB and, consequently, cannot be entertained.

IV. First, the Tribunal will examine the question of whether the Applicant's assignment to ECA took place, or should have taken place, under the VMS rules.

The Applicant applied for the post of Chief, Translation Services, pursuant to Vacancy Announcement 88-T-ECA-318-AA/ Recirc[ulated]. This post was to be filled according to the VMS. On 24 May 1989, the Recruitment and Placement Division, OHRM, acknowledged receipt of the application and added that his "qualifications will be considered".

On 29 May 1989, the Chief of Administration in ECA, informed Headquarters that "Executive Secretary has agreed to assignment from Headquarters to ECA of [the Applicant] for one year as Chief, Translation Services on post P-5-041".

The Applicant claims that he was assigned to the post pursuant to his response to the vacancy announcement. Consequently, he was subject to the provisions of the VMS, namely promotion to the following level after six months of satisfactory performance in the new post. The Respondent rejects such a claim.

To substantiate his claim, the Applicant submits that both ST/AI/338/Add.2 paragraph 2, and Add.4 paragraph 2, provide that "assignment of a staff member to a higher level post could only be

authorized within the vacancy management and staff redeployment programme". He also submits that, in a letter dated 6 June 1989, to the Administrative Officer in DCS, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, referred to the Applicant's assignment as being under the VMS. A copy of this letter was furnished to the Applicant. Also, in a letter to the Applicant by the same Recruitment and Placement Officer dated 19 June 1989, it is stated that the Applicant's assignment was connected with the vacancy announcement.

The Respondent submits that the request for the Applicant's transfer was received on 29 May, i.e., only five days after the Administration acknowledged receipt of the Applicant's response to the vacancy.

V. The Tribunal recalls that, when promotion through the VMS system was established under ST/AI/338 and its addenda, it was intended that all the assignments of staff to higher level posts be conducted under its provisions. Therefore, the Administration acted irregularly when it did not follow the selection process initiated pursuant to the vacancy announcement.

However, in this case, in the light of the short period of time which elapsed between the application for the vacancy and the request for the Applicant's transfer, the Tribunal accepts the Respondent's view, because, under these circumstances, it is clear that he did not intend to follow the selection process established by the VMS. The mention of the VMS in various documents related to the Applicant's assignment is not sufficient to alter the Tribunal's conviction in this respect.

VI. It also appears from the evidence before the Tribunal, that the Applicant was cognizant that the VMS would not be followed.

The Applicant contends, in his request for review dated 29 November 1991, that it was only two years after he was assigned

to ECA that he was informed that his "selection to fill the post had not been duly processed through the APB".

Nevertheless, even if he was not formally notified at the outset that the VMS system would not be followed, it is evident, in the Tribunal's view, that the Applicant must have been aware of this fact. His actions, at that time, were not those of somebody who is awaiting the outcome of a selection process.

In his submission to the Tribunal, the Applicant clearly states that he called on the Executive Secretary in May 1989, in New York, and convinced him to drop certain objections against his candidature. Pursuant to this conversation, the Executive Secretary, back in Addis Ababa, agreed to the assignment of the Applicant to ECA on 29 May 1989.

On 24 May 1989, the Applicant was informed that his candidature under the VMS "will be considered". On 29 May 1989, his assignment to ECA was decided. Even if the Applicant was not familiar with the details of the selection process under the VMS, it is evident that he could not have thought that it would take only four days.

It is, therefore, to be concluded that the Applicant was cognizant of the fact that he was not assigned to ECA under the VMS. This conclusion is confirmed by the expressions of the Applicant in his request for review dated 29 November 1989, when he states that "It was then (June 89) explained to me - verbally - that the extension of my assignment or <u>its conversion into a transfer</u> ... would depend on my performance ..." (emphasis added).

For the foregoing reasons, the Tribunal concludes that, even if the assignment of the Applicant to ECA outside the VMS constituted an irregularity, he was estopped from claiming damages, since he was aware of the irregularity and accepted it.

VII. The other issue before the Tribunal is whether the Applicant was adequately compensated for the injuries suffered following

irregularities in the preparation of his PERs. In order to assess the fairness of the compensation granted, the Tribunal took into consideration the following sequence of events. On 19 December 1989, the Applicant's performance was evaluated for the period 1 July 1989 (the date on which began his service at ECA) to 30 November 1989. This PER was signed only by the first reporting officer. The second reporting officer did not sign it at the time. On 28 June 1990, the Applicant was requested to fill a new PER form for the period 1 July 1989 to 30 June 1990, i.e., for his first year at ECA. On the same date, he was informed that the Chief, Administration and Conference Division, the second reporting officer, would also be his first reporting officer.

The Applicant, on 31 July 1990, objected to this procedure, claiming that his performance from July to November 1989 had already been assessed and should not be assessed again in the new PER. He refused to fill out the form.

The Applicant also requested the Panel on Discrimination to examine this point, among other issues. In its report, dated 4 February 1991, the Panel on Discrimination considered valid the first PER for the period July-November 1989.

On 1 March 1991, ECA initiated another PER for the Applicant's second year of service in ECA, from 1 July 1990 to 28 February 1991.

On 10 April 1991, the Chief, Administration and Conference Services Division, in view of the Panel on Discrimination's report, signed the original PER for the period July-November 1989, as second reporting officer.

On 17 April 1991, the Applicant complained to the Chief, Administration and Conference Services Division, regarding the fact that his name appeared as first and second reporting officer in the two PERs covering the periods 1 December 1989 to 30 June 1990 and 1 July 1990 to 28 February 1991.

On 22 April 1991, the Chief, Administration and Conference Division, inserted negative remarks in the PER for July-November 1989, which he had signed on 10 April.

On 29 August 1991, the Assistant Secretary-General, OHRM, in a cable to ECA, pointed out that "the primary responsibility for completion of the PER lies with the staff member's immediate supervisor as the first reporting officer and the next in line supervisor ... as the second reporting officer".

On 12 October 1991, the Applicant was informed by the Chief, Administration and Conference Services Division, that all his reports corresponding to his service with ECA would be completed according to the Assistant Secretary-General's recommendations.

Consequently, the report for the period July-December 1989 was considered valid, albeit with the negative comments inserted by the Chief, Administration and Conference Services Division. New PERs for the periods December 1989 to March 1990 and April 1990 to October 1991, had been prepared on 11 October 1991.

The Applicant rebutted all three reports. The Rebuttal Panel submitted its report on 13 March 1992. It concluded inter alia that the Rules governing PERs had not been fully observed. The Administration took no action regarding this report.

VIII. In view of this sequence of events, the Tribunal concludes that the Applicant has suffered considerably as a consequence of numerous irregularities, although some of them were subsequently remedied. Therefore, the Tribunal finds that the Applicant should be compensated in the amount of $3,000, in addition to the $2,000 already paid by the Respondent pursuant to the recommendation of the JAB.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of $3,000.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. María VICIEN-MILBURN
Executive Secretary

AT

UNITED NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/761
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 761

Case No. 825: BOQUIST

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 20 June 1994, Jarl Reinhold Cay-Rune Boquist, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 October 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"PLEAS

"(a) ... to find that

(i) The ruling by the Chief, Personnel Branch of ICAO, dated 6 November 1991 (...) that the decision to pay mobility allowance to the Applicant be reversed, was not in accordance with ICAO Staff Rule 103.14; and

(ii) The decision by the Secretary General of ICAO dated 24 March 1994 not to agree to the conclusion of the Advisory Joint Appeals Board (AJAB) was unfounded in facts and law.

(b) ... to order that:

(i) The Respondent resume payment of mobility allowance to the Applicant with full retroactive payment of that allowance."

Whereas the Respondent filed his answer on 30 June 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 1 November 1979, as an Air Traffic Control Terminal Area/Airways Control Instructor, on loan from the Swedish Board of Civil Aviation, at the P-4 level. He served in Nigeria under the Technical Cooperation Programme of the Technical Assistance Bureau until 31 December 1980. On 1 January 1981, he was transferred to Ethiopia where he served as Air Traffic Control Training and Planning Expert until 31 December 1981. On 1 January 1982, he was transferred to Qatar as Chief Air Traffic Services Instructor, where he served until 31 December 1982, when he was recalled by the Swedish Board of Civil Aviation.

On 18 July 1984, the Applicant re-entered the service of ICAO, having resigned from the Swedish Board of Civil Aviation. He was assigned to Vietnam as Air Traffic Services Instructor until 18 July 1985. He was then transferred to Qatar, as Chief Air Traffic Control Instructor. Upon its expiration, his appointment was extended until 31 December 1989. On 1 January 1990, the Applicant was reappointed to the post of Technical Officer, Air Traffic Services and Search and Rescue Section, Air Navigation Bureau, on a three year fixed-term contract. His appointment was extended for two years, and with effect from 20 September 1994, was converted to a permanent appointment.

In a memorandum to the Chief, Personnel, dated 25 June 1991, the Applicant applied for the mobility hardship allowance, stating that he had served more than five consecutive years since 1984, in addition to his early service from 1979 to 1982, and that he had

served at six duty stations, as required by Staff Rule 103.14. On 10 October 1991, the Applicant was notified that payment of the allowance had been granted, with effect from 1 July 1990, to be paid "until further notice".

In a letter dated 6 November 1991, the Chief, Personnel informed the Applicant that although it had been "concluded initially" that he was entitled to the mobility hardship allowance, "subsequently, it was brought to our attention that we should not have counted your assignments in Nigeria, Ethiopia and Qatar from 1 November 1979 to 31 December 1982 since these assignments were followed by a break in service of more than one month ... We will therefore be obliged to discontinue the payment of this allowance to you and to recover the payment which was effected last month."

On 12 November 1991, the Applicant requested the Secretary General to review the decision to discontinue payment of his mobility hardship allowance. On 6 December 1991, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). On 14 February 1994, the AJAB adopted its report. Its conclusions read as follows:

> "CONCLUSIONS
>
> 49. The Board concludes that, in the spirit of Staff Rule 103.14, and since the point at issue is not specifically covered by the Rule, the Appellant should be entitled to receive the mobility/hardship allowance from the time of his taking up his position in Montreal.
>
> 50. The Board also recommends that, in future, moves between duty stations which take place before a break in service, should not necessarily be disregarded in calculating eligibility for the mobility/hardship allowance. Where the break in service is of such a length that it is nevertheless deemed that previous changes of duty station should not be counted for this purpose, the Board recommends that the point be expressly included in the staff member's contract of service on his first engagement after the break in service."

On 24 March 1994, the Secretary General informed the Applicant as follows:

> "I regret that I do not agree with the Board's findings and conclusions in this case. However, as an exceptional measure, I have decided that the Organization will not recover the sums already paid to [the Applicant] in this regard."

On 27 October 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The mobility hardship allowance is designed to provide an incentive for staff members who have served in the United Nations common system for five consecutive years to accept reassignment to a different duty station. The Applicant has served for five consecutive years.

2. While the requirement of five years' consecutive service is clearly spelled out in Staff Rule 103.14, there is no requirement that the service in four or more duty stations must be consecutive. Consequently, the Applicant qualifies for the mobility allowance.

Whereas the Respondent's principal contentions are:

1. The rationale for the mobility hardship allowance comprises two elements for eligibility - the requirement of five or more consecutive years and the number of assignments specified in the rule.

2. The assignment requirement must be seen as an additional element within the consecutive period specified by the rule.

The Tribunal, having deliberated from 9 to 26 July 1996, now pronounces the following judgement:

I. The Applicant requests that the Tribunal rescind the decision of the Chief, Personnel Branch of ICAO to stop payment of a mobility/hardship allowance, and uphold the decision of the Advisory Joint Appeals Board (AJAB) dated 6 July 1993, to order the Respondent to resume payment of the mobility/harship allowance, with full retroactive payment of that allowance.

II. The Applicant applied for the allowance on 25 June 1991, claiming that he had served ICAO from July 1984 to that date, i.e. more than the five consecutive years required, in addition to earlier service from November 1979 to December 1982. During these years, he had served at six duty stations (1979-1982 in Nigeria, Ethiopia, and Qatar and 1984-1991 in Vietnam, Qatar, and Montreal). In response to the Applicant's request, the payment of a mobility/hardship allowance was initially authorized. However, on 6 November 1991, the Chief, Personnel Branch informed the Applicant that he was not entitled to the allowance, as his assignments in Nigeria, Ethiopia, and Qatar were followed by a break in service of more than one month.

III. The Applicant contends that Staff Rule 103.14 governing the mobility/hardship allowance does not require the duty station assignments to be served consecutively. Relevant excerpts from Staff Rule 103.14 provide the following:

> "**Mobility**
>
> 8. The element for mobility is designed to provide an incentive for staff members who have served in the United Nations common system for five consecutive years to accept reassignment to a different duty station. ...
>
> 9. To be eligible for the inclusion of the element for mobility at category H duty stations for the fourth and later assignments, however, a staff member must have previously had at least two assignments at duty stations in a category other than H."

IV. The facts in this case are not in dispute. The case rests entirely on differing interpretations of Staff Rule 103.14, governing the award of a mobility/hardship allowance. The Applicant has served for more than five consecutive years. Prior to assuming his post in Montreal, he was stationed in Vietnam and Qatar, which are non-category H duty stations. The only issue is whether the Applicant's assignments at duty stations prior to his break in service should be counted towards the duty station requirement of the mobility/hardship allowance.

V. The language of Staff Rule 103.14 explicitly requires five years of consecutive service to qualify for the mobility/hardship allowance, but does not discuss the effect of breaks in service between duty station assignments on staff eligibility for the allowance. The oral proceedings held by the AJAB on this case illuminate the meaning of certain statements by the Respondent and the process by which the Applicant's mobility/hardship allowance was granted and then revoked. The Applicant was initially granted the allowance by the Personnel Branch. At the AJAB oral proceedings, the Personnel Officer testified that there was nothing in the rules governing the mobility/hardship allowance which precluded the Applicant from receiving it. She further testified that "payment of the allowance had been withdrawn after consultations with ... Chief, Field Personnel Section, Technical Co-operation Bureau (TCB), who had informed the Personnel Branch that the TCB considered a break in service as a disqualifier to payment of the allowance." The Personnel Branch then modified its interpretation of the Rule to be consonant with the TCB. It was further determined at the AJAB oral proceedings that other organizations such as WHO, UNESCO and UNDP pay the allowance, irrespective of any breaks in service between assignments, provided the staff member has served in the UN common system for five consecutive years.

VI. The Respondent argues that requiring consecutive duty station assignments is a reasonable interpretation of the Rule that falls within the purview of the Secretary-General's discretionary authority. He further contends that without such a requirement, the allowance would "merely amount to a 'savings plan' that would provide staff members that have collected enough service years and assignments in their UN career, regardless of interruptions, with the benefits of the allowance."

VII. The AJAB found that:

> "... in the absence of a reference in the Staff Rule to the point of contention, the case hinges specifically on the purpose for which the allowance was conceived. The mobility component of the allowance appears to be intended to compensate a staff member for the disruptions to his or her life entailed by moves from one domicile to another. Such disruptions are a function of the moves themselves, and will be experienced even if the move is to or from the home country. The Board therefore considers that, in this case, the Appellant's break in service should not be a factor in calculating his eligibility for the allowance."

The Tribunal agrees with the AJAB. Paragraph 8 of Staff Rule 103.14 sets forth the requirement of five consecutive years of service. Paragraph 9, independently, sets forth the requirement of four duty stations assignments, including at least two hardship duty stations assignments, without reference to paragraph 8 or to the consecutive service requirement set forth therein. The Tribunal finds that the language of Staff Rule 103.14 does not require duty station assignments to be served consecutively. This interpretation of the Rule is consistent with the objective sought through the mobility/hardship allowance.

VIII. For the foregoing reasons, the Tribunal finds that the Applicant fulfills the eligibility requirements for the mobility/hardship allowance and is entitled to receive it.

IX. For the foregoing reasons, the Tribunal orders the Respondent to resume payment of the mobility/hardship allowance and make full retroactive payment of that allowance with 8 per cent interest from the date on which the allowance was discontinued until the date of its reinstatement.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/762
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 762

Case No. 827: SMITH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Deborah Baruch Smith, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 30 September 1994 and 31 December 1994;

Whereas, on 7 December 1994, the Applicant filed an application requesting the Tribunal:

"...

(a) To find that Respondent denied Applicant due process by:

i. Not granting ... fair and proper consideration ... to her candidacy for the post of Senior Public Affairs Assistant, Public Participation Section, Division of Public Affairs, UNICEF, GS-7 level, PAT No. 00510;

ii. The fact that the short list presented to the Appointment and Placement Committee was not comprised of 'all qualified candidates,' as admitted by Respondent, thereby omitting Applicant's candidature; and

iii. Denying Applicant her rights accorded under UNICEF personnel policy as stated in its Personnel Administrative Manual, Chapter 4.5.26, ...;

(b) To find that Applicant's exclusion from review by the Appointment and Placement Committee discriminated against her and thus deprived her of 'fair and proper' consideration;

(c) To find and rule that UNICEF breached its own basic procedures and policy, as presently established in its Personnel Administration Manual (PAM), Volume I, Chapter 4, item 4.5.26, requiring the full Appointment and Placement Committee to review **'all qualified candidates'** (emphasis added) applying for posts advertised under the Vacancy Management System;

(d) To find that the Joint Appeals Board's recommendation ... was incorrect in that it did not address the critical issues raised by Applicant, namely that she did not receive 'fair and proper' consideration for the post in accordance with UNICEF policies and procedures. ..."

Whereas the Respondent filed his answer on 3 January 1995;

Whereas the Applicant filed written observations on 1 February 1995;

Whereas the Applicant submitted an additional document on 1 April 1996 and, on 15 May and 6 June 1996, the Respondent provided his comments thereon;

Whereas, on 7 June 1996, the Respondent submitted an additional document;

Whereas, on 18 June 1996, the Applicant filed a further statement;

Whereas, on 22 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 13 May 1985, as a Secretary in the Division of Personnel, at the G-3 level, on a short-term appointment. On 13 November 1985, she was granted a fixed-term appointment for one month and nineteen days; this was successively extended through 1 November 1989. On 1 June 1986, the Applicant was promoted to the G-4 level, as a Senior Secretary in the Media Relations Section of the Division of Information and Public Affairs. On 1 December 1988, she was promoted to the G-5 level, as Principal Secretary, Division of Personnel. In July 1989, the Applicant went on mission as Senior Secretary to "Operation Lifeline Sudan", in Nairobi. On 1 November 1989, she was granted a probationary appointment. In March 1990, she was seconded as a Senior Secretary to the "Programme Mobilization Unit of the World Summit on Children". On 1 May 1990, she was granted a permanent appointment. On 26 December 1990, the Applicant was appointed Senior Secretary in the Media Relations Section of the Division of Information. In January 1993, the Applicant's functional title was changed to Media Assistant.

On 7 December 1992, the Applicant applied for the post of Senior Public Affairs Assistant, Public Participation Section, Division of Public Affairs. A total of 26 candidates applied for the vacancy. The General Service Recruitement and Placement Section (RPS) of the Division of Personnel reviewed all the candidates and made an initial short list, including the Applicant. This list was sent to the supervisor of the post, who prepared a short list and who recommended a candidate to the Selection Advisory Panel (SAP), of which he was a member.

The SAP met on 2 February 1993. It was constituted by the supervisor of the post, a representative from the Appointment and Placement Committee (APC) and a representative from the Division of Personnel. The SAP recommended the appointment of the candidate recommended by the supervisor of the post, whom it considered as fully meeting the requirements of the post, as well as being the best qualified of the candidates whose posts had been abolished. On 9 February 1993, the UNICEF New York General Service APC endorsed the SAP's recommendation, "acknowledging the importance of placing as many abolished post staff as possible, within the parameters of job qualifications". The appointment was approved by the Executive Director on the same day.

In a memorandum dated 24 February 1993, the Applicant informed an Assistant Recruitment Officer that she had learned from a third party that another candidate had been selected. When she had requested the APC minutes relevant to her candidature, she had been told there was "nothing to show me because my candidacy was neither mentioned nor discussed at, nor was my application seen by, the APC. ... because I was not a short-listed candidate". She requested to be informed of the reasons for her not being short-listed and to be shown the SAP minutes relating to her candidature.

In a reply dated 3 March 1993, the Assistant Recruitment Officer advised the Applicant as follows:

> "In line with the Director, DOP [Division of Personnel] circular CF/DOP/92-013 (copy of which is included in all files going to supervisors and APC Rep[resentative]s), priority should be given to staff members in abolished posts. Papers on these, plus background material on permanent staff members (yours included) were sent to the supervisor. After an extensive review, he short-listed those applicants whom he considered to be best suited. The case was submitted to the SAP and the APC, where the final selection was proposed, and the Executive Director endorsed the recommendation.
>
> ..."

On 17 June 1993, the Applicant requested the Executive Director to intervene. In a reply dated 16 July 1993, the Deputy Executive Director (Operations) advised the Applicant, inter alia, as follows:

> "... after a review of all applicants ..., the Recruitment Section short-listed all permanent staff members in abolished posts as well as permanent staff applicants who had the most relevant experience and skills. Your candidature was among those applicants initially short-listed and your papers were sent to the supervisor of the post.
>
> The supervisor then reviewed the applicants, inclusive of yourself, with particular attention to the initial shortlisting done by the Recruitment Section. He then did an additional shortlisting, focusing primarily on staff in abolished posts who fulfilled the specified job requirements and staff already at the G-6 or G-7 level.
>
> The Selection Advisory Panel reviewed the list of applicants and concurred with the shortlisting presented. Following a careful review they recommended the appointment of the selected applicant as fully meeting the requirements of the vacancy as well as being on an abolished post.
>
> Acknowledging the articulated importance of placing as many abolished post staff as possible, within the parameters of job qualifications, the Appointment and Placement Committee agreed with the findings of the SAP that the selected applicant was the most suitable candidate and accordingly endorsed her appointment. This appointment was approved by the Executive Director.

Considerations

After reviewing the selection process as outlined above, we cannot concur with your allegation that you were treated unfairly. Your application received full and fair consideration in line with our existing organisational policy.

We note your request for specific written answers to all your queries as to why you were not short-listed. You were indeed short-listed by the Recruitment Section, as indicated above, but not by the supervisor of the post. Additionally, we would like to draw your attention to the guiding principle maintained by the United Nations Administrative Tribunal that

the Executive Director has wide discretionary power in the selection of staff to fill vacant posts. UNICEF's obligations toward staff are to ensure that their applications receive consideration under the guidelines of the selection process. This was certainly done in your case. Further, the purpose of allowing for all vacancy notices to be advertised is to allow for an open competition among staff. It is then up to the prerogative of the Organisation to best determine, in accordance with our existing review mechanisms, which staff best match the qualifications.

Also it is not organisational policy to share with staff the full substance of deliberations on the selection process, inclusive of the supervisor's recommendation, and the SAP minutes. However, we note that both the Deputy Director, DOP, and the Director, DOI, as a courtesy took the time to speak to you at length about your application for this post. As explained to you during your discussions, while you are certainly entitled to your opinion as to the merits of your candidature, the unanimous recommendations of the SAP and the APC are clear indications that the best interests of the Organisation were served by the appointment of the selected candidate.

Further we note your query that 'If I am not qualified for a job which would be the next logical step in my career path, what is it that I need to advance at UNICEF'. A reading of your official status file indicates that in the past few years you have applied for a dozen or so different posts in various divisions, having considered yourself to possess the qualifications required. It thus appears that your career aspirations could well be pursued in a number of directions. UNICEF information circular 1986-17 on Career Development in UNICEF outlines the overall organisational policy and you may wish to consult that circular. Lastly, you are presently at the G-5 level and your application was for a G-7 post. Normally staff either at the level of, or one level below, are considered for vacancies and it is only very exceptionally that the Organization would appoint somebody more than one level below the post.

In conclusion we certainly do understand your disappointment in not being appointed for a post to which you aspired. However this post was subject to open competition and your candidature was given consideration. We therefore do not consider as valid your allegation that you were treated unfairly.

Please accept our assurances that the Organization does indeed value your work and your contributions and we trust you will continue to perform, as you have been doing, in an entirely satisfactory manner."

On 26 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 21 April 1994. Its conclusions and recommendation read as follows:

"Conclusions

...

22. The Panel initially addressed Appellant's claim that, in effect, her qualifications and work experience were such that she should have been selected for the subject post. As Respondent states in its [sic] reply, however, the Administrative Tribunal has made it clear that the 'assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. Neither the Tribunal (nor the JAB, as indicated in its report) can substitute its evaluation for that of the Respondent.' (Tribunal Judgement No. 594, Del Rosario-Santos). The Panel, therefore, 'would not substitute its view for that of the Secretary-General concerning the evaluation of the [Appellant's] performance, since the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.' (Tribunal Judgement No. 554, Fagan).

23. The Panel next considered Appellant's claim that there was a breach of procedure in UNICEF's consideration of Appellant for the subject post. In this regard, the Tribunal has indicated that 'the existence of prejudice or improper motive, breach of procedure or any other extraneous factor' may vitiate a decision (e.g., for appointment or promotion) contested by Appellant (Tribunal Judgement 554, Fagan).

24. Appellant contends that the APC is 'the only body formally established to give advice on promotion issues,' and that 'it is essential that information on all qualified candidates' be given to the APC to protect the Organization's interest in having the best candidate selected for any post and the staff member's interest in being given full and fair consideration. Appellant claims that, with respect to the

subject post, while her application was considered by the SAP, it was not presented to the APC. She maintains that this constituted a serious breach of procedure which precluded her from receiving due and fair consideration for the subject post.

25. In order to address Appellant's claim, the Panel reviewed the procedures set forth in the UNICEF Personnel Administration Manual, Chapter 4, describing the role and function of the Recruitment and Staff Development Section (RSDS), SAPs and the APC. Under the UNICEF's procedures, the SAP evaluates all qualified candidates for a particular post and, following such evaluation process, makes a recommendation to the APC for the selection of a specific candidate for such post. UNICEF's procedures specify that the SAP is to provide the APC with, among other documentation, 'the findings and recommendations of the [SAP] on all qualified candidates' (emphasis added).

26. As Appellant had urged, the Panel requested minutes of the APC relevant to the subject vacancy, as well as documentation submitted to the APC regarding the Appellant, to determine whether information regarding Appellant's candidature was provided to the APC. The Panel confirmed that, contrary to Appellant's claim, information regarding all applicants for the subject vacancy, including the Appellant, was submitted to the APC. The Panel noted that Appellant's level (G-5) was two grades below the level of the subject vacant post (G-7), and that the selected candidate was a permanent staff member at the G-6 level.

27. Based on the foregoing, the Panel concluded that Appellant's claim of a breach of procedure was without merit.

Recommendation

28. In light of the foregoing, the Panel recommends that the subject appeal be denied."

On 9 June 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General had accepted the JAB's recommendation and decided to take no further action in the case.

On 7 December 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied full and fair consideration with regard to the selection process for the post of Senior Public Affairs Assistant.

2. The UNICEF Personnel Administration Manual requires that the APC be furnished with the findings and recommendations of the SAP on all qualified candidates. The Applicant has been acknowledged as a qualified candidate but her candidacy was not considered by the APC or the SAP.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only a right to be considered for promotion.

2. The Applicant was fully and fairly considered for promotion in accordance with the applicable procedures.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General, accepting a recommendation by the JAB to reject the Applicant's appeal. The Applicant, a staff member at the G-5 level, claims that she was denied proper consideration for the G-7 level post for which she applied, in response to Vacancy Announcement L692-062. Her application was, in turn, submitted to the General Service Recruitment and Placement Section (RPS), which, in accordance with the procedures set forth in the UNICEF Personnel

Administration Manual (PAM), screened all the candidates and established a short list that included the Applicant's name. The PAM requires that, as next step in the selection process, the supervisor make a recommendation. In this case, in addition to the recommendation, the supervisor drew up a new short list, which was more restrictive than that drawn up by the RPS. This list consisted, chiefly, of the names of those candidates who were encumbering posts slated to be abolished. The Applicant's name was not included in this list. When the Selection Advisory Panel met, it reviewed the candidates included in both lists. The next step, according to the PAM, was to be a review by the APC of "all qualified candidates".

II. The Respondent submits that "The full list of Applicants, inclusive of the Appellant, was provided to the APC. This list provides reports on the candidates initially short-listed by RPS, such as employment history, education, skills, languages and UN/UNICEF experience."

The Applicant claims that this "does not come close to meeting the very specific requirements of UNICEF Personnel Administration Manual Rule 4.5.26", which states that "the findings and recommendations of the SAP on all qualified candidates" should be submitted to the APC.

III. The Tribunal notes that the basic issue is not whether the documents relating to the Applicant, submitted to the APC, were those required by the rules, but whether the documents submitted were actually examined by the APC.

IV. In the Tribunal's view, there is sufficient evidence to conclude that such documentation was not considered by the APC.

Nowhere does the Respondent claim more than that the documentation, complete or otherwise, was made available to the APC. The Applicant claims that she was informed verbally that her candidacy "was neither mentioned nor discussed at ... or seen by the APC". In his second submission to the JAB, the Respondent asserts that "the full list of applicants, including the Appellant, was provided to the APC". He never asserts, however, that her candidacy was actually considered by the APC. Furthermore, when explaining the reasons for not showing the APC's minutes to the Applicant, the Respondent states that "it is UNICEF's policy to share excerpts of APC minutes with the staff specifically mentioned in the minutes". The Tribunal is of the view that the complete absence of any reference to the Applicant in the minutes clearly shows that her candidacy was not considered.

V. In the Tribunal's view, the Applicant's candidacy should have been considered by the APC. In his submission before the JAB, the Respondent contends that it would be absurd for the APC to examine every single candidate and that "if one were to follow Appellant's logic, then there would be no need for RPS to do an initial screening, nor for a further review by the SAP".

The Tribunal, at this stage, will not enter into the question of whether all the candidates, or only those deemed "qualified", should be reviewed by the APC. It recalls, however, that the Applicant was included in the short list drawn up by RPS. That alone is sufficient to show that the Applicant was considered qualified. That this short list was supplemented by another more restrictive short list drawn up by the supervisor does not alter the fact that the only short list contemplated in the rules is that drawn up by the RPS (Rule 4.3.6). The inclusion of the Applicant's

name in that list was sufficient to warrant its consideration by the APC, irrespective of whether the APC should consider all candidates or only "qualified" ones.

VI. For the foregoing reasons, the Tribunal finds that the Applicant was not granted full and fair consideration when applying for the post of Senior Public Affairs Assistant, in the Division of Public Affairs, and orders the Respondent to pay her US$1,000.

All other pleas are rejected.

(Signatures)

Luis POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/763
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 763

Case No. 828: STEPANENKO

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 28 November 1994, Vladimir Alekseevich Stepanenko, a former staff member of the International Maritime Organization (hereinafter referred to as IMO), filed an application requesting the Tribunal to order, inter alia:

> "[. ... [that he] be reappointed as a staff member of the International Maritime Organization (IMO). The IMO Secretary-General should have maintained [him] in the service after 30 November 1994 in accordance with the IMO Staff Regulations and Rules, ... [that the Tribunal] rescind the IMO Secretary-General's decision of 6 May 1994 ... [and]
>
> 2. ... to recognize that the denial by the IMO Secretary-General to extend [his] appointment was arbitrary and illegal since it was based on the wishes of the Maritime Administration of the Russian Federation ...
>
> 3. ... to recognize that, ..., [he] was entitled, on the reasonable grounds and in the exceptional circumstances, to turn down [his] secondment status as a means of illegal pressure ... [and that his] former secondment status and relationship, which [he] discontinued on 26 March 1993, does not diminish [his] right to be duly and reasonably considered for further appointment in IMO ...

4. ... to recognize that ... the long-standing personnel policy concerning employment of translators in IMO constituted illegal discrimination ...

5. ...

6. In the event of compensation being paid in lieu of reappointment [he] respectfully request[s] the granting of [an] award in the amount of two year[s'] net base salary."

Whereas the Respondent filed his answer on 31 May 1995;

Whereas, on 8 July 1996, the Tribunal put questions to the Applicant and the Respondent, to which they both provided replies on 11 July 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 1 December 1992, as Head of the Russian Translation Section, on a two year fixed-term appointment at the P-5 level, on secondment from the Government of the Russian Federation.

In a letter dated 8 October 1991, to the Acting Head of the Foreign Relations Department of the then USSR Ministry of Merchant Marine, the Secretary-General of IMO noted the dissatisfaction of the USSR Ministry of Merchant Marine with the quality of translation of IMO documents into Russian. He suggested that the Head of Translation be replaced on the expiration of his appointment in November 1992 and concluded "In the forthcoming months we will be in touch with your representatives on appropriate co-operation for the submission of qualified candidates."

In a communication dated 5 May 1992, the Permanent Representative of the Russian Federation to IMO informed the Secretary-General that the Applicant, being "a civil servant in the Department of Maritime Transport of the Ministry of Transport of the Russian Federation", was "available" for the post of Head, Russian Translation Section, "just for the period of two years," and that

"an extension of the initial fixed term appointment should be made after consultation with the Government of the Russian Federation".

On 11 June 1992, the Applicant received a letter of appointment for a fixed-term of two years as Head of the Russian Translation Section. The letter noted under "Special Conditions" that the appointment "is granted on secondment from Government service", with a specified right to return to Government service. It further stated "By signing this Letter of Appointment, you specifically acknowledge that you have agreed to serve the International Maritime Organization on secondment from the service of your Government ..." On 26 June 1992, the Applicant accepted the offer of appointment. On 1 December 1992, he entered the service of IMO.

In a letter dated 26 March 1993, to the Permanent Representative of the Russian Federation to IMO, the Applicant reviewed recent developments in his Section relating to personnel. He noted the decision by the Department of Maritime Transport (DMT) to confirm the extension of the appointment of a translator "whose professional incompetence is beyond any doubt and is not disputed, in private conversations, by the officials of DMT or the RF [Russian Federation] Ministry of Transport." He informed the Permanent Representative that "desiring to be free in discharging my duties ... in full independence and without any external influence," he had decided to consider himself no longer bound by the conditions of secondment contained in his Letter of Appointment.

In a memorandum dated 29 March 1993, the Applicant informed the Director, Conference Division, that he had relinquished his secondment status, because it "might affect my job security if my judgement and discharge of my duties as Head of the Russian Translation Section remain unbiased and professionally honest."

On 16 April 1993, the Deputy Director, Department of Maritime Transport of the Russian Federation informed the Secretary-General, inter alia, that "The Department considers also that [the

Applicant's] unilateral announcement does not carry any ground for alteration of terms and conditions included into the Letter of Appointment ... of 11 June 1992 and has no legal force. Moreover, taking into account the fact that [the Applicant's] declaration directly breaks the principle of the secondment from government service we retain the right to initiate abrogation of the contract between IMO and [the Applicant] and submission of another candidate for the post of Head of Russian Translation Section".

In a memorandum to the Applicant dated 14 May 1993, the Head of the Personnel Section stated that "on 23 June 1992 you accepted the terms and conditions of [the] offer which embrace special conditions governing formal secondment arrangements between the Russian Federation and IMO in respect of your services. As such, you are in no position yourself to amend those terms". In a reply dated 17 May 1993, the Applicant, after acknowledging "that I am not in a position to amend the terms of my contract", stated "I will try to do my best to discharge duties assigned by IMO Secretariat in an efficient and dedicated way, ensuring that the duties in question are not affected in any way by an external to the Organization influence".

On 24 May 1993, the Secretary-General informed the Deputy Director, Department of Merchant Marine of the Russian Federation that the Applicant "has been informed of the Organization's position and has now indicated that he will comply totally with the Organization's Letter of Appointment". In a reply dated 19 October 1993, the Deputy Director informed the Secretary-General that "the Department of Maritime Transport has the intention to replace [the Applicant] after expiration of his appointment in 1994".

In a memorandum dated 30 November 1993, to the Head of the Personnel Section, the Applicant, noting that his contract was due to expire in November 1994, stated that "I would like to apply for renewal of my FT [fixed-term] contract with IMO ..." He added that he had severed his relationship with the Ministry of Transport of

the Russian Federation and that he therefore did "not seek or expect any 'approval' or 'confirmation'" of his appointment by the Russian Federation. He referred to Judgement No. 482, Qiu, Zhou, Yao (1990) of the Tribunal and noted "I cannot consider myself to be on genuine (valid) and formal secondment".

In a reply dated 15 December 1993, the Head of the Personnel Section, referring to his prior memorandum of 14 May 1993, concluded: "Accordingly, on expiry of your fixed-term contract, arrangements will be made for your repatriation to the place of entitlement in the Russian Federation." On 4 January 1994, the Applicant requested the Secretary-General to review the decision not to renew his fixed-term appointment, stating that his non-cooperation in "a cover-up of the professional incompetence" of a translator "had infuriated [the] RF [Russian Federation] Maritime Administration".

On 3 March 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 6 May 1994, the Secretary-General informed the Applicant that the contested decision "remains unchanged". The JAB adopted its report on 4 November 1994. Its conclusions and recommendation read as follows:

"6 CONCLUSIONS

From the foregoing, the Board concludes as follows:

(i) - The conditions laid down for an official to be on secondment are fulfilled in the case of [the Applicant]. His status was defined in writing by the competent Russian authorities; the conditions and particularly the duration of the secondment are clearly specified.

(ii) - [The Applicant] had by signing the Letter of Appointment on 26 June 1992, specifically accepted the terms and the conditions of the offer which embrace special conditions governing formal secondment arrangements between his Government and ... IMO in respect of his services.

(iii) - The unilateral decision taken by [the Applicant] to consider himself 'not bound any more by the special conditions contained in the letter of the Russian Federation's Permanent Mission to IMO' cannot stand alone, inasmuch as the contract is one and indivisible. Any changes that have to be brought about must be mutually agreed by the three parties concerned; which was not the case in the instance.

(iv) - In view of the documents in its possession, the JAB is not aware of any approach by IMO to the Russian Federation Authorities, with regard to the renewal of [the Applicant]'s contract.

(v) - The appellant's previous service in the Russian Translation Section on a permanent contract and his present service on a fixed-term contract have been fully satisfactory.

(vi) - The Board noted the Secretary-General's decision not to renew [the Applicant]'s contract. However, the Board is of the opinion that:

(a) The appellant was not given every reasonable consideration in contravention of the appropriate provisions of Regulations 4.2 and 4.4 of IMO Staff Regulations and Staff Rules, and relevant UN General Assembly resolutions.

(b) The appellant was not given a complete explanation for the denial of further employment.

7. CONCLUDING REMARKS

The Secretary-General may wish to reconsider the whole situation in the light of the conclusions outlined in this report."

On 25 November 1994, the Director, Administrative Division, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has studied the report very carefully and has concluded that no new facts have been brought forward or new arguments made which would lead him to reconsider his earlier decision."

On 28 November 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The acceptance by the Secretary-General of interference by the Russian Federation in imposing the worthless services of an unqualified translator constitutes an abuse of the secondment arrangement.

2. The special conditions of the Applicant's Letter of Appointment require consultation with the Russian Federation for extension of the appointment but no reference is expressly made to agreement by the Government as a prerequisite for extension.

3. The Applicant's former secondment relationship does not diminish his right and entitlement as an IMO staff member to be duly and reasonably considered for further appointment. General Assembly resolution 47/226 of 8 April 1993 has no retroactive effect.

Whereas the Respondent's principal contentions are:

1. The Applicant cannot unilaterally amend the conditions of his contract of employment which establishes a genuine tripartite secondment.

2. The Applicant's fixed-term appointment expires automatically, without prior notice and carries no right of renewal.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant accepted the post of Head, Russian Translation Section of the IMO, on a fixed-term appointment for two years, subject, inter alia, to the condition that his appointment was granted on secondment from Government service. The conditions governing the Applicant's right to return to Government service were specified in a letter of 5 May 1992 to the Secretary-General of IMO. The letter referred to the appointment of the Applicant as a solution to the problem of the quality of translation of IMO documents. It also stated that, as the Applicant was a civil servant in the Department of Marine Transport of the Ministry of Transport of the Russian Federation, the Government confirmed that he was available for the post for two years and that the extension of the initial fixed-term appointment should be made after consultation with the Government of the Russian Federation. The Government guaranteed that he would be re-employed in the Civil Service and that his promotion and pension rights were secure.

II. The Applicant accepted appointment on these terms and assumed his post on 1 December 1992. There was agreement on secondment between IMO, the Government and the Applicant. The principles governing secondment, set forth by the Tribunal in Judgement No. 482, Qiu, Zhou and Yao (1990), were observed.

III. Difficulties ensued for the Applicant shortly after he took up his post. These centred around the position of a particular translator, whose services the Applicant assessed as being "unsatisfactory" and whose work he described as worthless because of lack of basic skills and training. The Applicant recommended that there not be an extension of this translator's appointment. However, the appointment was extended.

As a result of these developments, the Applicant felt that his secondment status might affect his job security if he discharged his duties independently and without external influence. He,

therefore, decided to consider himself not bound by the special conditions under which he took up his appointment and so informed the Permanent Representative of the Russian Federation. The Applicant contends that the Russian Federation interfered with the independent exercise of his professional judgement.

IV. While the Tribunal finds that the secondment was valid and that, accordingly, the Applicant was not entitled to extract himself unilaterally from the tripartite agreement, he was entitled, irrespective of the secondment, to expect certain conditions in which to perform his functions.

The Applicant was appointed because of concern with the quality of translation of IMO documents and because of the belief that the Applicant's expertise would bring about some improvement. However, the Applicant felt unable to carry out his mission effectively, because, when he sought to ensure that the appointment of one of the incompetent translators would not be renewed, he apparently faced interference which, he claims, was motivated by considerations extraneous to the standard of performance. The Applicant's position is supported by staff of the Russian Translation Service.

V. The Applicant came to the conclusion that he could secure his future only by severing his ties with his Government. He clearly expected that this action would enable him to renew his fixed-term appointment without Government support. It is evident from the contents of the letter from the Head of the Personnel Section to the Applicant, dated 15 December 1993, that no consideration was given to the Applicant's request for continued employment.

While the Applicant's unilateral action concerning his contract, on secondment, is not sustainable, the Tribunal finds

that the first secondment contract does not preclude the possibility of the Applicant's further employment on a non-secondment basis. In this case, the Respondent could have advertised the post encumbered by the Applicant upon expiration of the appointment on secondment. Were the Applicant to apply for the post under such circumstances, he would be entitled to full and fair consideration without reference to his prior secondment or the consent of his Government. However, the Respondent has indicated to the Tribunal that it was in his interests to continue to fill the post on a secondment basis. Under these circumstances, the post was not advertised. The Tribunal finds that this decision was within the Respondent's discretion.

The Tribunal therefore concludes that the Applicant had no right to the renewal of his appointment, and as the post was not advertised, he had no right to apply and be considered for it.

VI. Nevertheless, the Tribunal finds that the Applicant was subject to improper interference in the performance of his functions, and this interference cannot be justified by secondment. All staff members, whether or not they are serving on secondment, must be able to perform their functions in an independent and professional manner, and it is the Respondent's duty to safeguard such conditions of employment.

VII. For the foregoing reasons, the Tribunal orders that:

(i) The Applicant be given priority consideration for any post for which he applies and is found to be qualified;

(ii) The Respondent pay the Applicant nine months of his net base salary, at the rate in effect on the date of his separation from service.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/764
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 764

Case No. 829: SIMATOS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Rose Simatos, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1995;

Whereas, on 14 December 1994, the Applicant filed an application requesting the Tribunal, inter alia:

"To order that:

(a) The Applicant be given fair and proper consideration for all posts where Applicant applies and meets the minimum requirements, and not to be excluded in order to bring the number of candidates down to a manageable short list;

(b) Applicant receive payment of compensation for the moral suffering and for unfair practices inflicted on the Applicant in an amount equivalent to two years' net base salary at P2/XI;

(c) Applicant receive payment of compensation for the disruption to the Applicant's career ... equivalent to four years' net base salary at grade P2/XI."

Whereas the Respondent filed his answer on 27 January 1995;

Whereas the Applicant filed written observations on 1 March 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 23 April 1973, as a Clerk/Typist in the Supply Division, on a three-month fixed-term appointment at the G-2 level. On 23 July 1973, the Applicant was granted a probationary appointment which became permanent on 1 April 1975. On 1 October 1973, she was promoted to the G-3 level, and on 1 January 1977, to the G-4 level, as a Personnel Clerk in the Division of Personnel. In June 1979, the Applicant transferred to the Staff Development and Training Section of the Personnel Division. On 1 January 1983, she was promoted to the G-5 level, as a Training Assistant. On 1 May 1987, she was promoted to the G-7 level, as Senior Training Assistant.

On 1 April 1993, the Applicant applied for the P-2 level post of Assistant Recruitment Officer. Thirty-four candidates in all applied for the post, twenty-six of whom were UNICEF staff members. The Recruitment and Placement Section (RPS) reviewed the candidates and compiled an initial short-listing. The Chief of RPS, who was also the supervisor of the post, presented his recommendation to the Selection Advisory Panel (SAP), which, on 27 April 1993, concurred with his recommendation. On 30 April 1993, the Appointment and Promotion Committee (APC) endorsed the SAP's recommendation. On the same day, the Deputy Executive Director (Operations) approved it.

On 5 May 1993, a Recruitment and Staff Development Officer informed the Applicant that another candidate had been selected for the post. In a memorandum dated 18 May 1993, the Applicant requested from the Chief of RPS a copy of the Minutes of the meeting of the APC at which it adopted its recommendation. In a reply dated 19 May 1993, a Recruitment Officer informed the Applicant, "as you

were not among the short-listed candidates, there are no specific excerpts from the APC minutes pertaining to your case."

In a memorandum dated 21 May 1993, to the Recruitment Officer, the Applicant stated, "I was astonished to learn that I was not among the short-listed candidates", as she had in the past performed the functions of the post. Noting that this was her fourth unsuccessful application for the post, she requested the reasons why, unlike others, she had not been short-listed.

In a reply dated 25 May 1993, the Chief, RPS, advised the Applicant that "since there were thirty-four candidates for this vacant post, a great effort had to be made to bring the number down to that of a short-list. Rest assured that your qualifications received a great deal of consideration, and that by consensus the selected candidate was found to be best suited for the post. The Executive Director concurred with this recommendation."

On 14 June 1993, the Applicant requested the Executive Director to review the decision not to select, or even to short-list, her for the post. In a reply dated 12 July 1993, the Deputy Executive Director (Operations) informed the Applicant that "after considering the full list of applicants, inclusive of yourself, as well as the short-listing done by the Recruitment Section, the Panel concurred with the recommendation of the supervisor for the selection of an applicant other than yourself." She noted that the candidate selected "fulfilled all the qualifications for the post and was already at the professional level."

On 4 August 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 10 March 1994. Its conclusions and recommendations read, in part, as follows:

> "25. ... under UNICEF's procedures, the SAP evaluates all qualified candidates for a particular post and, following such evaluation process, makes a recommendation, in this

instance, to the APC, for the selection of a specific candidate for such post. UNICEF's procedures further specify that the SAP is to provide the APC with, among other documentation, 'the findings and recommendations of the [SAP] on all qualified candidates.'

26. Respondent's description of the procedures used to fill the subject vacancy are inconsistent with the procedures described in the UNICEF Personnel Administration Manual. Respondent states that '[t]he Recruitment Section did an initial prescreening and short-listing and presented its findings to the SAP, along with the full list of applicants, inclusive of the Appellant.' Inasmuch as Appellant was among the candidates submitted to the SAP, based on UNICEF's procedures, Appellant was considered by the RSDS [Recruitment and Staff Development Section] to be a qualified candidate for the subject vacancy. Under UNICEF's procedures, the SAP is required to evaluate all qualified candidates and present the APC with its findings and recommendations on all qualified candidates. UNICEF's procedures do not authorize the SAP to eliminate qualified candidates from consideration by the APC. Under UNICEF's procedures, therefore, documentation on Appellant should have been provided to the APC. The SAP's failure to provide the APC with documentation on the Appellant (i.e., the SAP's findings and recommendations with respect to the Appellant, her fact sheet, her last performance evaluation report and, if indeed, the last four PER's and other data of a performance related nature from her Official Status File), whom the RSDS submitted to the SAP and thus had found to be a qualified candidate, was a breach of UNICEF's procedures.

27. Respondent states that '[t]he SAP did indeed provide to the APC findings on all those they considered to be qualified.' Under UNICEF's procedures, however, the SAP does not determine whether applicants are 'qualified candidates.' According to paragraph 4.3.6, this responsibility rests with the RSDS. The SAP evaluates all qualified candidates and must present documentation on all qualified candidates to the APC.

Recommendations

28. As compensation for having been unfairly excluded from proper consideration for the subject vacancy, the Panel recommends, as requested by Appellant, that UNICEF identify another core post in New York for consideration of Appellant's candidacy. The Panel notes, however, that Appellant already has the right to apply and be considered

for UNICEF posts so such recommendation affords Appellant nothing more than that to which she is already entitled.

29. Although the Panel does not know whether consideration of Appellant's candidacy by the APC would have resulted in the selection of Appellant to fill the subject vacancy, Appellant was eliminated at an earlier stage from consideration by the APC as a result of UNICEF's breach of its procedures. The Panel recommends, as compensation for UNICEF's breach of its own procedures and the harm to Appellant resulting from UNICEF's failure to give her candidacy proper and fair consideration, that Appellant be compensated in the amount of $1,000.00."

On 28 June 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"In accordance with standard UNICEF application of the procedures in the Personnel Administration Manual (PAM) to the selection for a professional post, your name was not submitted to either the Selection Advisory Panel (SAP) or the Appointment and Placement Committee (APC) as a 'qualified' candidate, as UNICEF regularly and consistently equates 'qualified' as 'short-listed' in the professional selection process. Although your name was submitted as an applicant, full supporting documentation concerning your application was not transmitted to either the SAP or the APC, as you were not a short-listed candidate.

In the light of this finding, the Secretary-General has determined that there was no breach of procedures in your case. In making this determination, the Secretary-General was aware of the careful consideration given to your case by the Board. However, he felt that re-examination was warranted as the Board's analysis and recommendation were based on an incorrect premise - that full supporting documentation concerning your application was submitted to the level of the SAP as if you had been determined to be a 'qualified' candidate and that there was a failure thereafter to similarly submit to the APC.

In making his determination, the Secretary-General found that there was no evidence of discriminatory measures being taken in your case and that, clearly, no special procedure was adopted. He took note of the fact that, as the selection in your case involved a post in the Division of Personnel,

two members of the APC, instead of the usual one representative, were on the SAP to ensure transparency.

The Secretary-General has also determined that clarity is needed in the terminology of the PAM and he is requesting UNICEF to review the text and to make appropriate revisions. The Secretary-General is also requesting UNICEF to re-examine its application of procedures and to give consideration to the transmittal of fact sheets on all internal applicants to the SAP and APC.

The Secretary-General has lastly taken note that your original statement of appeal did not question procedures but addressed the issue of why you were not short listed for the post in question. The Secretary-General has noted and is in agreement with the conclusion of the Joint Appeals Board, and its citation of Administrative Tribunal jurisprudence, that the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.

In the light of the above, the Secretary-General has decided not to accept the Board 's conclusion that there was a breach of procedure by UNICEF in your case or its consequent recommendation that you be paid compensation."

On 14 December 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given due consideration for promotion in accordance with UN Staff Rules and Regulations and UNICEF administrative issuances. This constituted a denial of due process.

2. Proper consideration by the APC is central to appointments. The Applicant was denied such consideration for a post for which she is qualified and whose functions she had previously performed.

3. UNICEF's interpretation of "all qualified candidates" contradicts the Personnel Administration Manual and led to the

Applicant's exclusion from fair and proper consideration for promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only a right to be considered for promotion.

2. The Applicant was fully and fairly considered for promotion in accordance with the applicable procedures.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant appeals a decision by the Secretary-General, rejecting the recommendation of the JAB to award the Applicant $1,000 as compensation for the Respondent's "failure to give [the Applicant's] candidacy proper and fair consideration". In his decision, the Secretary-General admitted that "In accordance with standard UNICEF application of the procedures in the Personnel Administration Manual (PAM) to the selection for a professional post, your [the Applicant's] name was not submitted to either the Selection Advisory Panel (SAP) or the Appointment and Promotion Committee (APC) as a 'qualified' candidate, as UNICEF regularly and consistently equates 'qualified'' as 'short-listed' in the professional selection process. Although your name was submitted as an applicant, full supporting documentation concerning your application was not transmitted to either the SAP or the APC, as you [the Applicant] are <u>not</u> a short-listed candidate".

II. In her submission, the Applicant claims that she was not fairly and fully considered for the P-2 post for which she had applied. She also contends that the Respondent did not follow the

relevant rules set forth in the UNICEF Personnel Administration Manual.

III. According to the UNICEF Personnel Administration Manual, the selection process is conducted as follows: (a) candidates submit their applications (Rule 4.3.4); (b) the Recruitment and Staff Development Section (RSDS) prepares a list of at least three qualified candidates. At the same time, the supervisor makes his or her recommendation (Rule 4.3.6); (c) A Selection Advisory Panel (SAP) of three members "evaluates all the qualified candidates" (Rule 4.4.7). The initial review by the RSDS is supposed to simplify the work of the SAP, but not to preclude a review of all candidates by the SAP (Rule 4.3.6); (d) Following this review, the SAP makes a recommendation (Rule 4.4.7); (e) The next step in the selection process takes place before the APC or the Appointment and Promotion Board.

IV. The Applicant contends that, in accordance with Rule 4.3.6, all candidates should be reviewed by all the bodies involved in the selection process. The Respondent, on the other hand, claims that only "qualified candidates" should be reviewed by the SAP and the APC. He equates "qualified candidates" with candidates included in the short list drawn up by RSDS. In the Respondent's view, the rest of the candidates would only have their names transmitted to the SAP and the APC. As the Applicant's name was not included in the short list drawn up by RSDS, the Respondent, in accordance with his criteria, merely transmitted it to the SAP, without her application for the post and supporting documentation.

V. In his decision on the JAB report, the Secretary-General clearly admits, referring to the Applicant, that "your name was not submitted to either the Selection Advirosy Panel (SAP) or the Appointment and Placement Committee (APC) as a 'qualified' candidate

... Although your name was submitted as an applicant, full supporting documentation ... was not transmitted to either the SAP or the APC ..."

VI. The Tribunal is called upon to decide whether the procedure followed by the Respondent is in keeping with the provisions of the UNICEF Personnel Administration Manual.

As far as the procedures before the SAP are concerned, the Tribunal finds that the Applicant should have been reviewed by the SAP. Paragraph 4.3.6 of the UNICEF Personnel Administration Manual clearly states that the short list drawn up by RSDS should only "simplify the work of the Selection Advisory Panel but will not preclude a review of all candidates by the Panel" (emphasis added).

It could be argued that the expression "to preclude", used in the rule, makes it optional for the SAP to review all candidates. The Tribunal does not share this view. For, in the next step, i.e. consideration of the candidates by the APC, the rules add, as a proviso, that such review shall be carried out only "as needed" (Rule 4.2.1).

No such proviso exists in connection with the SAP, thus showing that, at that stage, all candidates must be reviewed.

It is clear, therefore, that, in the review before the SAP, the rules, as currently written, draw no distinction between qualified and other candidates. Even those candidates not considered qualified according to the Administration's criterion should be reviewed. The mere submission of their names, if not for review, would serve no useful purpose. Because of the lack of a definition of "qualified", anyone who submits a candidacy, which, on the face of it, meets the requirements of the vacancy notice, must be considered as qualified and must, therefore have his or her candidacy reviewed by the review bodies. The Tribunal recommends that UNICEF should consider amending the current rules to clarify these procedures.

VII. In the Tribunal's view, therefore, the Administration has disregarded the current rules, thus causing harm to the Applicant. The Tribunal finds that, as a result of the SAP's failure to review the Applicant's candidacy, the Respondent denied her the full and fair consideration to which she was entitled under the Tribunal's jurisprudence. In the Tribunal's view, these violations give rise to a right to compensation.

VIII. The Tribunal will not address the question of whether the Applicant should or should not have been reviewed by the APC at the final stage of the selection process. In its view, this would not alter the responsibility already incurred by the Administration through its failure to review the Applicant's candidacy in the SAP.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay $1,000 to the Applicant.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/765
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 765

Case No. 837: ANDERSON BIELER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Ngaire Anderson Bieler, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 15 April, 31 July, 31 October 1993, 31 January, 29 April, 31 July, 31 October 1994, and 31 January 1995;

Whereas, on 31 January 1995, the Applicant filed an application requesting that the Tribunal:

"...

1. Find that the Secretary-General, by delaying the selection of an applicant for Post No. 91-P-PSC-287-NY (Senior Political Affairs Officer) for eight months after applications had been received, denied the Applicant the possibility of promotion under the vacancy management rules according to the provisions of ST/AI/338/Add.2 ...

2. Find that the Secretary-General failed to act in accordance with the provisions of ST/SGB/237, paragraph 5 ...

[relating to filling posts by female candidates]

...

6. Uphold the unanimous decision of the Joint Appeals Board by awarding the Applicant monetary damages in an amount equal to the higher salary she would have received had she been promoted, together with a lump sum reflecting the actuarial difference in her pension in view of her non-promotion. In any event, damages for moral injury in the amount of six months salary should be awarded to the Applicant."

Whereas the Respondent filed his answer on 6 June 1995;

Whereas the Applicant filed written observations on 31 October 1995;

Whereas, on 10 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 12 and 23 July 1996;

Whereas, on 22 July 1996, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations in March 1960, as a Guide-Trainee, on a three-month fixed-term appointment. She served on further fixed-term appointments as a Guide and Dispatcher in the Visitors Service, External Relations Division (ERD), Department of Public Information (DPI), until 30 September 1965. On 1 January 1966, she was employed as a Clerk in the Visitors Service on a fixed-term appointment of three months, at the G-3, step IV level. She resigned, with effect from 19 May 1967. On 23 September 1970, the Applicant re-entered the service of the Organization as a Guide Training and Briefing Officer in DPI at the P-1 level, on a probationary appointment which became permanent on 1 September 1972. On 1 April 1973, she was promoted to the P-2 level, as Associate Information Officer, and on 1 June 1978, she was promoted to the P-3 level, as Chief, Guided Tour Unit. On 1 April 1985, she was promoted to the P-4 level. From 18 October 1990 to 17 February 1991, the Applicant was temporarily assigned from the Presentation, Press and Publicity Division, DPI, to the Security

Council and Political Committees Division (SCPCD), Department of Political and Security Council Affairs (PSCA), against a P-5 post. The Applicant was paid a special post allowance at the P-5 level, with effect from 18 January 1991 until 31 January 1993, when the Applicant retired, having been retained in service beyond the retirement age, which she reached on 31 May 1992.

In response to a vacancy announcement, the Applicant applied, on 20 May 1991, for the P-5 post of Senior Political Affairs Officer in the Secretariat of the Arms Embargo Committee, Office of the Director, SCPCD, PSCA. The post was to become vacant upon the retirement of its incumbent, who reached the statutory age of retirement in September 1991. His appointment was extended until 31 October 1991. On 12 December 1991, the Applicant was notified that she had been short listed for the post along with two other staff members. On 23 January 1992, the Applicant was informed that a staff member other than herself had been selected for the post.

On 27 January 1992, the Applicant requested the Secretary-General to review the decision not to appoint her to the post. She noted "the provisions of ST/SGB/237 concerning the status of women in the Secretariat" and stated "I understand that both of the other names short-listed were men." On 12 March 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) and requested suspension of action on the decision appealed.

On 26 March 1992, the JAB adopted its report on the request for suspension of action. It concluded that "as the successful candidate had already been placed in the post, it could not recommend a suspension of action". It, however, recommended that "no action be taken to promote the current incumbent of the P-5 post in question", pending the outcome of the appeal. The JAB also recommended that the Secretary-General "order special accelerated proceedings in this appeal". On 21 May 1992, the Officer-in-Charge, Department of Administration and Management, transmitted the JAB report to the Applicant and informed her that the Secretary-General

"has concluded that the contested decision was already implemented with the selection and placement on the post of another staff member who was found to have also met all the requirements of the post and that, therefore, the Board's recommendation for suspension of action cannot be accepted."

On 27 August 1992, the JAB adopted its report on the merits of the appeal. Its considerations and recommendations read as follows:

"Considerations

15. The Appellant applied for the post in May 1991. Between that date and the date when a selection was made, in January 1992, eight months had elapsed. By then, the Administration alleges, it would have been too late to select the Appellant because she would not have met the requirement for officially assuming the post six months after the appointment date; by then she would have reached retirement age. The Panel, however, noted that, had the Administration not delayed taking action on this appointment, the Appellant would have been well within the necessary time for occupying the post.

16. The Panel recalled its recommendations in the suspension of action request brought by the Appellant in March 1992, and expressed concern that the Administration had not accepted the accelerated timetable that it had proposed for the review of this appeal. If the timetable had been adhered to, a decision on this appeal could have been taken before the promotion of the incumbent in the contested post became irrevocable. Now, the Panel was facing a fait accompli. The decision to delay the Respondent's reply until 17 June 1992 sent a clear message to both the Panel and the Appellant that the Administration did not want to offer even a theoretical chance of redress: the best the Appellant could now hope for was compensation after the fact.

17. The Panel concluded that had the Administration acted efficiently and taken action, the vacancy would have been filled by the Appellant; she was a most deserving candidate, and her selection would have achieved all the objectives set out in the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and promulgated in ST/SGB/237. The Respondent's reply does not contest this assessment.

18. At this time, because there is no way to completely redress the situation, the Appellant having reached the statutory retirement age, the Panel considered the intangible damage that flows from the situation. In this case, the Organization has been the ultimate loser by not fully utilizing the potential of a highly qualified staff member. At the same time, it has converted the last years of the Appellant's career, which should have been the most rewarding, into a period of suffering, humiliation and disappointment with the Organization for which she has worked for over thirty years.

19. The Panel wishes to point out that there is a thin line here between the legal and moral issues. The fact remains that the Appellant has been precluded by the delaying tactics of her Department from selection for a post for which she was well qualified and this was done in violation of the spirit of the Secretary-General's directive. Moreover, the Appellant has been denied the satisfaction of ending her career with the dignity that would flow from the recognition of her abilities.

Recommendations

20. The Panel recommends that the Appellant be granted a valedictory promotion retroactively, to January 1992, the approximate date when she would have been promoted had the Administration followed its own rules. Thus, the spirit of the Secretary-General's decision taken in implementation of the Fifth Report of the Steering Committee would be respected.

21. Should the Secretary-General decline to grant this equitable relief, then the Appellant should be awarded monetary damages in an amount equal to the higher salary she would have received had she been promoted, together with a lump sum reflecting the actuarial difference in her pension in view of her non-promotion. In any event, damages for moral injury in the amount of three months salary should be paid to the Appellant."

On 15 October 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant the JAB report and informed her as follows:

"The Secretary-General has reexamined your case in the light of the Board's report. Bearing in mind that:

(i) No staff member has the right to be promoted, and that qualifications, experience, favourable performance reports and seniority do not give rise to any expectancy of promotion, valedictory or otherwise;

(ii) As evidenced by the inclusion of your name in the short-list drawn up by the Appointment and Promotion Board, you received full and fair consideration for the P-5 post for which you applied;

(iii) Although, under the provisions of ST/SGB/237, women candidates who match all the qualifications of a post are entitled to the benefit of special measures, it was a reasonable exercise of discretion by the Under-Secretary-General of the Department of Political and Security Council Affairs to select a candidate other than yourself for the post in question since, under the provisions of ST/AI/338/Add.2, your eventual promotion could not have been implemented before you had reached the statutory retirement age;

(iv) The Administration's processing of the applications for the vacant P-5 post in question was in strict compliance with the applicable rules and did not cause any undue delay;

(v) In accordance with the rules governing the Vacancy Management System, the selection of the successful candidate for the post in question created for him a legitimate expectation to be promoted six months after assuming the full functions of the higher-level post; that expectation could be defeated only if the department was unable to certify that the staff member had performed satisfactorily the functions of the higher-level post and if the Appointment and Promotion Board failed to endorse the promotion;

(vi) Compliance with the timetable recommended by the Board in a prior suspension of action proceeding would have served no useful purpose since your appeal was filed after the successful candidate had been selected for the post, and could in no way impinge upon that staff member's legitimate expectation of promotion to the level of that post,

the Secretary-General cannot accept the Board's recommendations on your appeal. He has decided to maintain the contested decision and to take no further action in your case."

On 31 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant met all of the requirements of the post for which she applied and, as a woman, she should have been selected for the post, in accordance with ST/SGB/237.

2. By extending the appointment of the incumbent of the post beyond his statutory retirement age, the Respondent failed to act in accordance with the generally accepted practice that extensions past retirement age not be given if they would block the promotion of another staff member.

3. The Respondent's refusal to accept the unanimous recommendations of the JAB contradicts his commitment to the policy of accepting unanimous JAB recommendations except where a major question of law or principle is involved.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to be promoted. The decision not to select the Applicant for the post in question was within the discretionary powers of the Respondent and did not violate the Applicant's rights.

2. The Applicant is entitled to the benefit of ST/SGB/237, but, in accordance with the Tribunal's jurisprudence, there is no resulting automatic right to promotion. The mere fact that in a particular case a male candidate was preferred over a female candidate does not demonstrate that the affirmative action measures were not applied.

3. The decision to extend the employment of the incumbent of the post in question beyond his statutory retirement age was within the discretionary authority of the Respondent and did not violate the Applicant's rights.

4. The decision not to accept the unanimous JAB recommendation in favour of the Applicant was within the Respondent's authority.

The Tribunal, having deliberated from 9 to 26 July 1996, now pronounces the following judgement:

I. The facts of this case do not appear to be in dispute. On 20 May 1991, the Applicant applied for the post of Senior Political Affairs Officer, under the Vacancy Management System then in force. This post was to become vacant in September 1991, when the incumbent would reach the statutory retirement age. Upon his reaching retirement age, the incumbent's appointment was extended to 31 October 1991, thus delaying selection of his replacement. In the context of the selection process, the Applicant was short-listed for the post, along with two male staff members. On 17 January 1992, one of the short-listed male staff members was selected for the post.

II. The Applicant contends that the Respondent's failure to select her for the post was not in accordance with the provisions of ST/SGB/237 which provides that:

> "... the following policy shall apply in the area of assignment and promotion:
>
> > In departments and offices with less than 35 per cent women at levels P-5 and above, vacancies overall and in the latter group, respectively, shall be filled, when there are one or more female candidates whose qualifications match all the requirements for a vacant post, by one of these female candidates."

The Department of Political and Security Council Affairs did not meet the percentages required by the Secretary-General's Bulletin.

The Tribunal notes the Joint Appeals Board's conclusion that:

> "Had the Administration acted efficiently and taken action, the vacancy would have been filled by the Appellant; she was a most deserving candidate, and her selection would have achieved all the objectives set out in the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and promulgated in ST/SGB/237. The Respondent's reply does not contest this assessment."

III. The Respondent cites Judgement No. 671, Grinblat (1995) as disavowing any automatic right on the part of the Applicant to be promoted as a result of ST/SGB/237. The Tribunal wishes to clarify its ruling in Judgement No. 671. This judgement involved the application of ST/SGB/237 by the Appointment and Promotions Board (APB) in compiling the short list for a post prior to Departmental consideration of the list to determine who should fill the post. The Tribunal concluded that it was inappropriate for the APB to exclude equally qualified male applicants from short lists and that ST/SGB/237 should have been applied by the Department concerned.

IV. The Tribunal also found in Grinblat that the APB's application of ST/SGB/237 in compiling the short-list did not conform with UN resolutions and Article 101(3) of the Charter which provides that "the paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence and integrity ..." However, the Tribunal's finding only affected ST/SGB/237: "to the extent that the bulletin was interpreted as purporting to authorize the promotion of

candidates solely on the basis of gender if they merely met the requirements of the vacant post without regard to whether there were better qualified candidates for the post." (paragraph XV, emphasis added). This finding does not preclude the application of ST/SGB/237 to mandate the selection of women candidates when they are found to be equally qualified. Indeed, in Grinblat the Tribunal held that, although it would be impermissible to view Article 8 of the Charter, which provides for equal opportunity in United Nations employment, as overriding Article 101(3), at the same time Article 8 "must be regarded as a source of authority for reasonable efforts to improve the status of women". The judgement further noted "Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, ..."

V. Unlike Grinblat, the present case involves the application of ST/SGB/237 by the Department filling the post. The Tribunal reaffirms that the affirmative action measure establishes a right to preferential treatment for women whose qualifications "are substantially equal to the qualifications of competing male candidates" (Judgement No. 671, Grinblat, paragraph XIX) when the other requirements of ST/SGB/237 are met. The Applicant's qualifications were at least equal to those of the other candidates. Indeed, the Tribunal notes that the former Director, Security Council and Political Committees Division, stated that the Applicant "was the best qualified of the candidates in the short list" and that he would have indicated this had he been consulted on the appointment decision.

The Tribunal finds that, as the Applicant was the only woman short-listed for the post, and as she was equally, if not more, qualified for the post, she had a right to promotion, in the light of ST/SGB/237.

VI. The Applicant further contends that the delay in selection of a replacement for the vacant post for eight months after the applications for the post had been received denied her the possibility of promotion. The vacancy management rules provide that a promotion be implemented as of the beginning of the seventh month after the staff member has assumed the full functions of the higher-level post. By that time, the Applicant would have reached retirement age. But for the Administration's delay in the recruitment process, resulting in significant part, from the extension of the incumbent of the post beyond retirement age, the Applicant's promotion could have been implemented. The Respondent argues that eight months was not unreasonable in all the circumstances, yet he does not delineate the particular circumstances warranting the delay in the appointment. The Tribunal notes, in this regard, the comment by the former Director of the Political and Security Council Committees Division that the extension of the incumbent in the post beyond retirement age was not justified by exceptional circumstances and "did not serve the interests of the Organization."

VII. The Tribunal has held that denying promotion of a staff member because he or she was approaching retirement age violates principles of equity and fairness. (Judgement No. 483, Kleckner (1990), Judgement No. 690, Chileshe (1995)). Similarly, in this case, the Tribunal finds that the delay in the recruitment process, resulting in the selection of a staff member other than the Applicant, was inequitable and unfair, and deprived her of a promotion to which she was entitled.

VIII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant compensation in the amount of $10.00.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/766
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 766

Case No. 846: INGUILIZIAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 28 July 1994, Ludmilla Inguilizian, a former staff member of the United Nations Office at Vienna (hereinafter referred to as UNOV), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 February 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "... to restore my entitlement to termination indemnity, which had been authorized by the Assistant Secretary-General, Office of Human Resources Management, in his letter to me of 6 August 1992 (...), which, in the notification of the Secretary-General's decision is stated as having been accorded to me, which, in fact, however - being the lower payment - had been abrogated through the interim arrangements specified in paragraph 4(g) of UNOV Information Circular UN/INF.243 (...)"

Whereas, on 14 April 1995, the Applicant submitted copies of correspondence with the Respondent, dated 30 March and 7 April 1995;

Whereas, on 22 May 1995, the Applicant submitted a copy of a communication from the Respondent, dated 10 May 1995;

Whereas the Respondent filed his answer on 11 December 1995;

Whereas the Applicant filed written observations on 19 January 1996;

Whereas, on 10 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 12 July 1996;

Whereas, on 17 July 1996, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNOV on 1 August 1968, on a short-term appointment as a Secretary at the G-4 level. On 1 June 1970, the Applicant was promoted to the G-5 level, as an Administrative Clerk. She served on further short-term and fixed-term appointments until 1 April 1971, when she was granted a probationary appointment which became permanent on 1 December 1971. On 1 January 1974, the Applicant was promoted to the G-6 level, and on 1 January 1978, she was promoted to the G-7 level, as an Administrative Assistant. On 1 January 1984, she was promoted to the G-8 level. She separated from service with effect from 28 August 1992, at the G-7 level, the change in grade reflecting a renumbering of levels at the duty station.

On 6 March 1990, the Division of Administrative Services in UNOV issued an information circular to inform staff on the eligibility criteria and mode of payment for the end-of-service allowance (EOSA) established by the International Civil Service Commission. The circular provided, inter alia, in paragraph 4(g), that payment of EOSA would be made to staff members "Upon termination of appointment, including termination for health reasons, after three years or more of continuous service with the United Nations Office at Vienna. In this case, either the termination indemnity or EOSA, whichever is greater, will be paid".

On 30 July 1991, the Office of Human Resources Management (OHRM) forwarded the Applicant's case to the UN Medical Director in order to determine whether the Applicant was eligible for a disability benefit. On 9 December 1991, the Medical Director recommended submission of the Applicant's case to the UN Joint

Staff Pension Committee. On 27 July 1992, OHRM was informed that the UN Joint Staff Pension Committee had awarded a disability benefit to the Applicant.

In a letter dated 6 August 1992, the Assistant Secretary-General, OHRM, informed the Applicant as follows:

> "I regret to inform you that the Secretary-General has decided to terminate your permanent appointment with the United Nations for reasons of health, in accordance with the provisions of Staff Regulation 9.1(a). The effective date of the termination of your appointment will be the date the notice of termination is given.
>
> As you may have already been advised by the Secretary of the United Nations Joint Staff Pension Fund, the payment of your disability benefit will begin on the date following that on which you cease to be entitled to salary and emoluments from the United Nations. Because of your age, no medical review will be required in your case under Administrative Rule H.6.
>
> You will receive termination indemnity in accordance with Annex III to the Staff Regulations. The indemnity will be reduced by the amount of any disability benefit you may receive from the United Nations Joint Staff Pension Fund, for the number of months to which the indemnity rate corresponds. You will also receive three months compensation in lieu of the required notice in accordance with Staff Rule 109.3(c).
>
> ..."

On 21 August 1992, a Personnel Officer, UNOV, informed the Applicant, inter alia, that:

> "... the Secretary-General has decided to terminate your permanent appointment with the Organization for reasons of health, in accordance with the provisions of Staff Regulation 9.1(a). The effective date of the termination of your appointment will be **6 August 1992**, the date of the notice of termination. (emphasis in the original)
>
> You will be entitled to termination indemnity under Annex III, para. (b) of the Staff Regulations which is equivalent to 12 months pensionable remuneration less staff assessment. However, may I point out that any amount of disability benefit you will receive must be deducted from the termination indemnity payable to you. You will also receive

three months compensation in lieu of notice of termination under Staff Rule 109.3(c).

Furthermore, please note that as you qualify for payment of end-of-service allowance [EOSA], only the higher of the two entitlements, i.e. termination indemnity or EOSA, will be paid in accordance with Information Circular 243 dated 6 March 1990 (...).

..."

In a letter dated 1 September 1992, to the Personnel Officer, the Applicant challenged the date of termination - 6 August 1992. She also contested the non-accrual of sick leave and the payment conditions of her termination indemnity and end-of-service allowance, both of which she claimed she was entitled to, on the grounds that they were unrelated.

In a reply dated 2 September 1992, the Personnel Officer informed the Applicant that the effective date of termination had been amended to 28 August 1992, to reflect the date of receipt of notice. He explained the Administration's decision on sick leave. With regard to the payment of her entitlements, he stated, inter alia, as follows:

"End-of-service allowance. As you point out, para. 4(g) of UN/INF.243 provides for payment of the EOSA [end-of-service allowance] in case of termination, including termination for reasons of health, with however the restriction that only the termination indemnity or EOSA, whichever is larger, will be paid. I have taken note of your arguments, most of which had been raised by the staff representatives at the time of the introduction of the EOSA, that both EOSA and termination indemnities should be payable. Those arguments notwithstanding, the provisions of the current policy will have to be applied in your case. As concerns agreed termination, I had simply explained that the circular was silent on this matter since by definition the elements in the separation package for an agreed termination are a matter of negotiation, subject to agreement both on the part of the staff member and the Organization."

On 23 September 1992, the Applicant requested the Secretary-General to review this decision. On 3 January 1993, she lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its

report on 26 April 1994. Its conclusions and recommendations read as follows:

"1) Between 1 January 1972 and 28 February 1987, the Appellant received an allowance as a component of salary to compensate for 'Abfertigung' paid under Austrian law to employees who separate from service and meet certain conditions. By virtue of the regular receipt of this ad hoc benefit over the 15 year period and her continued service after introduction of the replacement scheme until separation on 28 August 1992, the Applicant acquired a right to receive the EOSA benefit.

2) The Applicant was entitled under Regulation 9.3(a) of the Staff Rules to be paid Termination Indemnity in accordance with the rates and conditions specified in Annex III to those Regulations, and was so paid.

3) There is no express or implied condition in the Staff Rules and Staff Regulations preventing the payment of both Termination Indemnity and of any other benefit such as EOSA in the event of termination for reasons of health (indeed, it appears that the 'Abfertigung' compensation allowance as a component of salary and Termination Indemnity were both paid to staff members who separated prior to 28 February 1987). The conditions limiting payment of Termination Indemnity in these circumstances are expressly and exhaustively stated in subparagraph (b) of Annex III of the Staff Rules.

4) The Applicant's acquired right to receive EOSA could not be abrogated, except by adequate legislative authority. Not even the ICSC [International Civil Service Commission] can take such rights away. Insofar as paragraph 4(g) of Information Circular UN/INF.243 of 6 March 1990 purported to abrogate that right, it was without legal effect. UN/INF.243 is merely an information circular on provisional arrangements and not yet the official policy of the Organization. In the opinion of the Panel, appropriate amendment of the Staff Rules and Staff Regulations would be necessary to achieve that effect.

In view of all the above, the Panel recommends that the Appellant be paid the amount of EOSA due to her, and that should it be decided that payment of both Termination Indemnity (in whole or in part) and EOSA should not occur in such cases in future, the Secretary-General introduce appropriate amendments to the Staff Rules. In the interim, the Panel draws attention to the risk that similar claims to that of the Appellant in this case may arise."

On 8 December 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's recommendation that you be paid the amount of End-of-Service-Allowance (EOSA) due to you in addition to the termination indemnity. The Board bases its recommendation on the assumption that you had an acquired right to continued payment of EOSA because you had received it on a regular monthly basis prior to the ICSC recommended change to an end-of-service grant. This is an error. The Tribunal has repeatedly held that statutory provisions are subject to prospective change (see Judgement No. 19, Kaplan, (1953), para. 3; see also Judgement No. 370, Molinier (1986), para. XLIII)). It follows that the UN information circular may change, prospectively, the conditions for payment of EOSA. This is what it did. Thus the whole basis of the JAB recommendation is thus wrong in law.
>
> The Board also seemed to assume that EOSA is a Termination Indemnity promulgated by the Staff Regulations and that, therefore, it could not be abrogated by circular. This is mistaken. The EOSA, as a result of ICSC actions, was implemented by Information Circular UN/INF.243, which also defined its terms. It is not a 'termination indemnity' pursuant to the Staff Regulations. It follows that there is no legal obstacle to implementation of the clear intent of Information Circular UN/INF.243, which was to avoid double payments. In your case the Termination Indemnity would be higher that EOSA and so, under para. 5(g) of the circular, no EOSA would be payable.
>
> The Secretary-General has determined that the Board's recommendation is based on errors of fact and wrong in law. The Secretary-General, therefore, cannot accept the recommendations of the Board. No further action in regard to your case will be taken."

On 10 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

On 10 May 1995, the Under-Secretary-General informed the Applicant as follows:

> "The Secretary-General has re-examined his decision of 8 December 1994 on the recommendations made by the JAB in the

above Report in the light of your appeal to the Administrative Tribunal.

The JAB had recommended that you be paid End-of-Service Allowance (EOSA) in addition to Termination Indemnity as it considered that you had an acquired right to payment of EOSA. The Secretary-General concluded that the legislative intent was to avoid double payments and thus concluded that EOSA should not be paid. You appealed to the Tribunal pointing out that EOSA had been paid to you and that you were seeking payment of Termination Indemnity. It is this error that the present review addresses.

The Secretary-General considers that the basic legislative intent is to avoid double payment of EOSA and Termination Indemnity and this was the stated basis of his decision of 8 December 1994 that you should not be paid EOSA. The principle against double payment still applies, even though the JAB had mistaken which payment you were claiming.

We apologize for the confusion but it is clear that the legislative intent in the Administrative Instruction establishing EOSA is to avoid double payment. The Instruction does, however, entitle a separating staff member to the higher of the two amounts. Although payment authorized by a Staff Regulation cannot be taken away by an Administrative Instruction, an Instruction can give a staff member a right to a terminal indemnity payment that is higher than set out in a Staff Regulation, while seeking to avoid double payment of such terminal indemnities. Accordingly, the Secretary-General has decided to treat the payment to you of AS 207,870 for EOSA as made up of AS 199,156 for Termination Indemnity and AS 8,714 as being the difference between EOSA and Termination Indemnity (...). You are thus being paid the higher of the two amounts. However, the Secretary-General maintains that there is no entitlement to double payment, i.e., payment of both EOSA and Termination Indemnity; and it is this issue that he considers is to be decided by the Tribunal.

We note that you have appealed the manner of calculation of EOSA and, if it is decided that the calculations are in error and that EOSA was greater than AS 207,870, you would be paid the difference.

..."

Whereas the Applicant's principal contentions are:

1. The end-of-service allowance and the termination indemnity represent unrelated entitlements, arising from different legal conditions.

2. The Applicant's termination indemnity has been altogether cancelled, pursuant to provisions in UN/INF.243 paragraph 4.(g), but none of the staff rules involves payment restrictions on two unrelated entitlements. The information circular dealing with end-of-service allowance cannot abrogate the Applicant's right to a termination indemnity.

Whereas the Respondent's principal contention is:

The regime of EOSA implemented by the Secretary-General prohibits double payment of EOSA and termination indemnity. That regime is part of the Applicant's terms and conditions of employment and its application to the Applicant does not violate her rights.

The Tribunal, having deliberated from 9 to 26 July 1996, now pronounces the following judgement:

I. The Applicant joined the United Nations Office at Vienna (UNOV) on 1 August 1968, as a Secretary at the G-4 level. She was promoted over the years, and, upon separation, was serving as Administrative Assistant at the G-7 level. The Applicant's services were terminated for health reasons in August 1992. At that time, she was entitled to a termination indemnity under Staff Regulation 9.3 and Annex III of the Staff Regulations. She was also entitled to a local end of service allowance (EOSA). The issue before the Tribunal is whether the Applicant is entitled to payment of both the termination indemnity and the EOSA, in full.

II. There is no dispute as to whether the Applicant is entitled to payment of the termination indemnity, as provided in Staff Regulation 9.3 and Annex III to the Staff Regulations. However, the Information Circular UN/INF.243 of 6 March 1990, informing the UNOV staff of the new regime governing the payment of the EOSA, stated that, upon termination of appointment, "either the termination indemnity or EOSA, whichever is greater, will be paid." The Tribunal finds, as the Respondent concedes, that this text is not properly worded. Clearly the termination indemnity, which is incorporated into the Staff Regulations and Rules, is a right that cannot be limited or reduced by the EOSA. The Respondent's intent, as expressed in the circular, was to reduce the EOSA by the amount of the termination indemnity, in effect, making the EOSA a supplementary payment to be made in the event that it would entitle a staff member to more than he or she would receive otherwise as a termination indemnity. Following the payments made to the Applicant, the Respondent re-characterized these payments, to reflect the payment of a full termination indemnity and a partial EOSA, representing the portion exceeding the termination indemnity.

III. Despite the poorly drafted language of the information circular of 6 March 1990, the Tribunal accepts the clear intent of the Respondent with regard to the circular and finds that the misuse of language, which suggested that the Applicant was denied a termination indemnity, has been rectified. The Applicant is entitled to, and has been paid, a full termination indemnity. The real question before the Tribunal is whether she is also entitled to a payment, in full, of the EOSA.

IV. The EOSA was initially promulgated as a local compensation allowance, which was included as a component of salary from 1 January 1972 to 28 February 1987. The information circular, of 6 March 1990, advised staff members that, with effect from 1 March 1987, the EOSA would be paid to staff members, upon their separation from service. It is clear from the deliberations of the

International Civil Service Commission, which led to the change in the modalities of payment of the EOSA as of March 1987, that consideration was given to the extent to which the termination indemnity, provided for in the Staff Regulations, was financially comparable to the EOSA.

V. In considering the provision of the information circular which permits the reduction of the EOSA by the amount of termination indemnity, the Tribunal looks to the underlying purpose of the EOSA. Both the additional salary component, which was included from 1972 to 1987, and the EOSA payment, which was introduced with effect from 1987, were intended to ensure that conditions of employment for United Nations General Service staff members in Vienna were comparable to prevailing conditions of employment in Vienna. In particular, these measures were devised to approximate to the "Abfertigung" payment which is made to Austrian employees upon their separation from employment.

VI. The Tribunal notes that the purpose of the termination indemnity is to compensate staff members for their accelerated separation from service, as a result of termination. The EOSA, in contrast, is payable, regardless of the manner in which the staff member separates from service, in recognition of this service. For this reason, the Tribunal finds that the payment of EOSA and termination indemnity does not constitute a double payment and the Applicant is entitled to both payments.

Having reached the conclusion that the payment of the EOSA and termination indemnity does not <u>per se</u> constitute a double payment, the Tribunal considers whether the Applicant, who had been entitled to EOSA, could have her entitlement curtailed through an information circular. In this respect, the Tribunal finds that the Applicant's entitlement to this benefit has been acquired through service and cannot be altered by an information circular. The changes contemplated by the information circular of 6 March 1990 could only be implemented prospectively.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant the portion of the EOSA which she has not received.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary